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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAUL MITCHELL, Defendant and Appellant.	A122108 (Alameda County Super. Ct. No. C153930)

Appellant Paul Mitchell (Mitchell) was charged with multiple felony counts of sexual assault. After discharge of a series of retained or appointed counsel, he successfully sought to exercise his right of self-representation. Several months later, at the time of trial, his request for reappointment of counsel was denied, although he was provided advisory counsel during part of the trial. He was convicted by a jury of eight counts of sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)),[1] three counts of forcible oral copulation (§ 288a, subd. (c)(2)), and one count of forcible rape (§ 261, subd. (a)(2)). Mitchell appeals, contending that the trial court violated his federal constitutional rights in that it: (1) abused its discretion by denying his request at the time of trial for the reappointment of counsel, and by refusing to further continue the trial; (2) erred in allowing advisory counsel to interfere with his control of the case; (3) improperly ordered him restrained and removed from the courtroom; (4) erred by failing to properly instruct the jury

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

concerning his restraints; and (5) committed cumulative errors requiring reversal. We find no prejudicial error and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mitchell does not challenge the sufficiency of the evidence supporting his convictions. We recite the operative facts to give context to his claims of prejudicial error.

Elizabeth Doe testified that, in 1997, she lived alone in an apartment in Berkeley. Sometime shortly after midnight on May 18, 1997, Elizabeth returned to her apartment, which was located on the floor above a carport, after having dinner at a friend's house. She undressed, got into bed, and fell asleep. She was awoken from a deep sleep when someone pounced on her, landing on her midsection. The assailant pulled the covers over her head and clamped a hand over her mouth. Elizabeth could not move because the weight of his body was on top of her. She was not able to see anything, but she detected a strong smell of body odor, dirt, and cigarette smoke. The assailant pressed a hard and cold object against her body and told her: "Be quiet, be quiet. Do as I say and I won't hurt you." Elizabeth Doe decided that "[her] best chance for surviving this was to do what he said."

The assailant asked "[w]hat time is your boyfriend coming home?" After telling him no one was coming home, the assailant placed a pillowcase over her head, stuffed a wad of paper towels in her mouth, and tightened the pillowcase around her neck. The assailant then began massaging Elizabeth's body, manually stimulating her, and penetrated both her vagina and anus with his finger. He then orally copulated Elizabeth. Next, the assailant told Elizabeth to get up and led her, by the arm, into her living room. He removed the gag from Elizabeth's mouth, asked her to show him where she kept liquor, loosened the pillowcase, handed her a bottle of liquor, and told her to drink. After he was not satisfied with the few, small sips Elizabeth took, she feigned swallowing more alcohol. He then led Elizabeth to a chair, where he again penetrated her vagina and anus with his fingers.

The assailant then moved Elizabeth to the other side of her living room, sat her on a wooden chair, and began massaging her again. At one point, Elizabeth lost her balance and reached out to catch her fall. Her hand landed on the assailant's thigh, which she described as "hairy" and "[not] very big around." The assailant commenced touching and penetrating her vagina and anus with his fingers once more. The assailant then took Elizabeth by the arm and led her back to her bedroom. He asked her to drink and she complied by pretending to swallow from the liquor bottle he handed her. He then again penetrated Elizabeth's vagina and anus. He told Elizabeth: "You're a really wonderful lover. I'm really enjoying your body very much."

The assailant then ordered Elizabeth to get on her hands and knees. He laid on the bed and pulled Elizabeth down on top of him so that they were lying chest to chest. He loosened the pillowcase, raised it just enough to expose Elizabeth's mouth, and began kissing her on the lips. The assailant reminded her that he had a weapon and made it clear that he wanted her to open her mouth. Elizabeth could tell that her assailant had very full lips and some facial hair both on his upper lip and his chin. Next, the assailant pushed Elizabeth's head down towards his groin, saying, "Don't worry. I'm clean. No STDs." The assailant placed his penis in Elizabeth's mouth and, when she remained motionless, he began thrusting until he ejaculated.

The assailant led Elizabeth back to the sofa in the living room where he orally copulated her. He then led her back to the bedroom, ordered her to lie on the bed face down, massaged and spanked her buttocks, rubbed his penis on her, ordered her to turn over, and then penetrated her vagina with his penis. He ordered her to lie next to him, took her arm and draped it over his torso, and said "I hope you're enjoying loving me as much as I'm enjoying loving you." After he rested, the assailant became talkative. Elizabeth testified: "I can't give you examples of like exact things that he said but I remember the tone of it. It was very, very rambling and very philosophical. . . . [I]t sounded like he somewhat considered himself quite an intellectual and quite a philosopher." The assailant also told her that he was sorry

they had to meet as they had and that he would have liked to "have enjoyed [her] mind and [her] spirituality, rather than just [her] body."

Elizabeth told the assailant, in an effort to get him to leave, that she was running the Bay to Breakers the next day with friends and that they were coming to pick her up very early in the morning. Elizabeth testified to hearing the assailant put his clothes on, open and close her drawers, and pop the battery out of her cordless phone. Elizabeth also heard what sounded like the assailant wiping surfaces down. He led her to the bathroom, where she heard him splashing and running water. He next led her to the kitchen, where she heard the refrigerator open, a bottle cap unscrewed, and liquor bottles clinking. The assailant asked her for money and she told him she had some in a tote bag, which he led her to retrieve. After Elizabeth removed the bills inside, the assailant asked for postage stamps, which she removed from her tote bag and gave to him. The assailant asked to see her student identification card and told her she was "a real cutie" when she produced a card with her photo on it. He encouraged Elizabeth's studies, told her he was hiding the battery and cords to her phones outside,[2] and then told her "I'm going to leave now. Make sure that you lock the door behind me. And from now on you should be more careful and make sure you lock your door."

After hearing the assailant leave and waiting several minutes, Elizabeth walked around the apartment to ensure she was alone, removed the pillowcase from her head, and locked her door. Elizabeth then used her computer to phone the police. The police arrived, took Elizabeth to the emergency room where samples were collected for a sexual assault kit,[3] and took her statement at the police station. Elizabeth described the assailant to police as likely an African-American male, with

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[2] These were later located in a recycling bin just outside the front door of Elizabeth's apartment.

[3] The examiner noted that Elizabeth had two scratches above her left breast, three scratches over the back of the right shoulder, but no genital lesions.

facial hair, who was of average height and medium build, and who wore a band around his wrist.[4] She also indicated that he had a slight Caribbean accent. The police dusted for fingerprints at Elizabeth's apartment, collected evidence, including several pieces of black-colored hair, and took photographs.[5] A fresh, latent fingerprint was found on a vase in Elizabeth's bedroom.[6] None of Elizabeth's fingerprints were found at the scene.

Sperm was found on both the vaginal and rectal swabs from the sexual assault kit. DNA evidence from the sperm on the vaginal swab was extracted and analyzed. A genetic profile for the sperm on the vaginal swab was generated and placed into the Combined DNA Index System (CODIS), a national computerized database of both evidentiary and known DNA profiles. Several years later, in 2005, there was a "cold hit" on the evidentiary DNA profile, indicating a match with a database known DNA profile for Mitchell. The Berkeley police department was informed of the match.

The latent fingerprint lifted from the vase was also matched to fingerprint exemplars for Mitchell. The comparison revealed that "the latent was made by the subject Paul Mitchell" and that "it probably was made shortly before [police] came and processed the scene." Mitchell was arrested on July 1, 2005.

After Mitchell's arrest in 2005, the Berkeley police department obtained an additional DNA sample from Mitchell to confirm the "cold hit" from the database.

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[4] Elizabeth testified at trial: "Now that I've seen you, I don't believe that there's anything in a physical description that is inconsistent with what you look like." She also testified that "[Mitchell's] voice sounds familiar and certainly the way he talks is very reminiscent of the kind of philosophizing he was doing the night in my apartment."

[5] The defense established that the hair was not analyzed and that police found no signs of forced entry at Elizabeth's apartment. However, the People did present evidence that Elizabeth's kitchen window was found ajar and that a canvas chair on the balcony, beneath the window, had a footprint on it.

[6] While the assailant was present in her bedroom, Elizabeth had heard dried eucalyptus rustling against the vase, which led her to believe that the assailant had picked it up.

The 2005 sample matched the profile from the sperm found on the vaginal swab. In 2006, another sample was obtained from Mitchell. Again, the DNA matched that from both the vaginal swab and the 2005 sample. The criminalist who analyzed the DNA evidence, and who qualified as an expert in DNA analysis and interpretation, testified: "Unless there is an identical twin, in my opinion . . . Mitchell was the source of the DNA on the vaginal swab."[7] She further testified that "the probability that a random unrepresented individual who by chance possessed the DNA profile in the vaginal swab is estimated to be one in 2 quintillion for African-Americans . . . ."

As discussed *post*, Mitchell proceeded pro per at trial. The defense presented the testimony of four witnesses: Henry Wellington, Thomas Graber, Rosalind Berger, and Barbara Thomas. Wellington testified that he arrested Mitchell, on July 1, 2005, on two minor vehicle code warrants. Wellington knew at the time that Mitchell was a person of interest in an ongoing investigation. Graber, who was a neighbor of Elizabeth's, testified that, on the night of the attack, he heard noises of metal on metal and metal on wood. He then saw an unidentified person walk into view at the bottom of the apartment driveway. Graber did not know who attacked Elizabeth. Berger, an acquaintance of Mitchell's, testified that, in 2005, she had allowed Mitchell to sleep in a camper she had parked close to a city maintenance yard where Berkeley police cars parked. She testified that the lock on the camper did not work and she probably would not have noticed if an intruder had entered the camper. Barbara Thomas, who represented Mitchell at his preliminary hearing, confirmed that Elizabeth Doe could not identify Mitchell as the assailant at that time. Mitchell did not testify.

After less than one full day of deliberation, the jury found Mitchell guilty of eight counts of sexual penetration by a foreign object, three counts of forcible oral

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[7] Mitchell asked one of the People's DNA experts, on cross-examination, about the possibility of "fabricat[ing] the [DNA] evidence." The witness responded: "I think it would be very difficult. It would have to originate at the time of collection. I find it extremely unlikely, but not impossible."

copulation, and one count of forcible rape. The jury also found enhancement allegations under section 667.61, subdivisions (c), (d)(4), and (e)(6), to be true. Mitchell was sentenced to imprisonment for a total term of 55 years to life. This timely appeal followed.

II. DISCUSSION

Mitchell contends that the trial court: (1) abused its discretion by denying his request for the reappointment of counsel at the time of trial, and by refusing to continue trial; (2) allowed appointed advisory counsel to interfere with his control of the case; (3) improperly ordered him restrained and removed from the courtroom; (4) erred by failing to properly instruct the jury concerning his restraints; and (5) committed cumulative errors requiring reversal. We address each of these arguments in order.

A. Reappointment of Counsel

First, Mitchell contends that the trial court abused its discretion in denying his requests to terminate his previously requested self-representation and to reassert his right to counsel. We find no abuse of discretion.

1. Procedural Background

Pre-trial Motions

A felony complaint, charging Mitchell with the sexual assaults on Elizabeth Doe, was filed on July 5, 2005. On August 15, 2005, the court granted the motion of Mitchell's retained counsel, John Taylor, to withdraw on the basis of conflict with his client. Mitchell then indicated that he did not wish to represent himself or to be represented by the public defender, but would seek to retain another attorney. It appears that Mitchell was unsuccessful in this attempt, and on a date not reflected in the record before us, the public defender was appointed to represent Mitchell.[8] On

[8] The record before us reflects this appointment in an appearance by a deputy public defender on December 28, 2005, on a hearing on a demurrer to the complaint. The public defender also appeared for Mitchell on March 22, 2006, seeking an order for medical and dental evaluations.

May 16, 2006, Mitchell made a *Marsden*[9] motion, asking the court to discharge the deputy public defender, and either appoint new counsel, or permit him to represent himself. The motion was granted and Mitchell's case was referred to conflicts counsel. On May 22, 2006, after two attorneys declined to accept the appointment, Mitchell moved to represent himself, under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). The court advised Mitchell on the record of the consequences of self-representation, found a knowing and intelligent waiver of the right to counsel, and granted the motion.

Although the record is again incomplete on this issue, it appears that Mitchell nonetheless accepted the appointment of attorney Barbara Thomas at some time in May 2006. On November 3, 2006, Thomas represented Mitchell at his preliminary hearing, after his *Marsden* motion to relieve her was denied.

At his arraignment on the information, Mitchell again made a *Faretta* motion for self-representation. The motion was denied on the basis that Mitchell had accepted, if not requested, appointment of counsel after his prior *Faretta* motion had been granted. Attorney Thomas then declared a doubt as to Mitchell's mental competence and proceedings were suspended, pursuant to section 1368.

Mitchell was found competent to stand trial, and when proceedings were reinstated on January 26, 2007, Mitchell renewed his motion to represent himself before Judge Kenneth Kingsbury. Mitchell completed and signed a "Petition to Proceed in Propria Persona," whereby he acknowledged, in relevant part: "I understand that I have the right to be represented by a lawyer at all stages of the proceedings and, if I do not have funds to employ counsel, one will be appointed for me by the court. If the Court grants my Petition to Proceed in Propria Persona, and if I am permitted to represent myself, I understand I will have to conduct my own defense without the aid of counsel, unless the court grants a motion by me for advisory counsel. [¶] Understanding all of the constitutional rights set forth above, it

[9] *People v. Marsden* (1970) 2 Cal.3d 118.

is my personal desire that I be granted permission by the Court to proceed in propria persona (acting as my own attorney) and that by making this request, I am giving up the right to be represented by a lawyer appointed by the Court."

Mitchell was further advised: "[I]f you wish to change this, make sure that you do so well in advance of a trial date if a trial date has been set because one of the major triggers here is if a trial date has been set and a lawyer comes in to try to enter into your case, which has to be done by motion or approved by the court, and the first words out of the lawyer's mouth or nearly the first words are: By the way, I can't go to trial on this date. I need a continuance of six weeks, two months, three months to do independent investigation. [¶] . . . [¶] That's probably going to be frowned upon. So I can't advise you, but I will tell you that if you are going to turn away from *Faretta*, if you are satisfied that's the wrong thing to do in the future, it's much more likely to be granted if no trial date has been set." Mitchell's motion was granted.

In March of 2007, Mitchell made several requests, to both Judge C. Don Clay and Judge Kingsbury, for the appointment of advisory counsel. These requests were denied. Mitchell's motion for the assistance of an investigator was granted and several different investigators were appointed. In November 2007, another request for advisory counsel was denied by Judge Clay.

Trial Motions

On January 28, 2008,[10] the case was assigned to Judge Cartwright for jury trial. Mitchell again requested advisory counsel, standby counsel, or cocounsel.[11]

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[10] Unless otherwise specified, all subsequent dates stated herein occurred in the year 2008.

[11] " 'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked. [Citations.] 'Advisory counsel,' by contrast, is appointed to assist the self-represented defendant if and when the defendant requests help." (*People v. Blair* (2005) 36 Cal.4th 686, 725.)

Judge Cartwright noted that a prior judge had denied similar requests and "[she was] not going to re-rule on that."

Mitchell did not, however, indicate that he wished to terminate his self-representation. Instead he made it clear that he still wished to represent himself, but wanted advisory counsel appointed to assist him. On February 4, Mitchell told Judge Cartwright that he had elected self-representation because "I had a plan. My plan was to go pro per and then get advisory counsel. I messed up in that I got the pro per but I didn't get the advisory counsel."[12] On the following day, he said "It may seem that I've wanted to represent myself. I've only used that as a vehicle so that I could get to represent myself with either co-counsel or represent myself with advisory counsel." On February 6, the trial court conducted a hearing to ensure that Mitchell was receiving adequate propria persona services. The court also appointed a new investigator.

On February 20, after a jury panel was sworn, Mitchell informed the trial court: "I have a problem with not having an attorney." The trial court did not respond. Later that same day, Mitchell learned that Dr. Blake, a DNA expert that Mitchell had sought to engage, declined to work with self-represented defendants. Mitchell stated: "I need an attorney." Again, the record does not reflect any response from the court.

On February 21, before opening statements were made, the record reflects the following discussion:

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[12] At the time that Judge Kingsbury granted Mitchell's *Faretta* motion, he advised him: "[Y]ou're going to have to conduct your own defense without the aid of counsel unless *under rare circumstances*, and not by this court, you could petition to ask for advisory counsel. . . . [¶] . . . [¶] I know that in some instances, underscore the word 'some,' the court has permitted advisory counsel. That means an attorney would be able to advise you throughout the proceedings, be able to sit in the courtroom and if you have a question be able to answer it. But you pretty much when you go under Faretta or in pro per, a person in pro per as they call you, that is a separate motion to ask for advisory counsel or co-counsel." (Italics added.)

"MR. MITCHELL: And the other thing I'd like to state for the record before we begin is that my participation in these proceedings are not in any way to reflect that I am still not asking for an attorney.

"THE COURT: We've gone through that and I told you I don't want to hear another word about it. We've already decided. You said you wanted to go pro per. That's what you're doing. You're not going to stand up here every single day and put that on the record.

"MR. MITCHELL: I said it was everyday I was going to say I wanted an attorney.

"THE COURT: We don't need to hear it everyday.

"MR. MITCHELL: The other thing is I do intend on cooperating with the Court. But like I said, I want to state for the record I am doing this under duress and I do want an attorney.

"THE COURT: Have a seat. That's enough of that.

"MR. MITCHELL: I'm telling the truth.

"THE COURT: We've heard that 50 times.

"MR. MITCHELL: You're going to hear it 100 times.

"THE COURT: We understand it. And you're proceeding pro per.

"[THE PROSECUTOR]: I would like to make a clarification, because the request today is [a] little bit different, which is just an attorney where in the past it's been other co-counsel or advisory attorney which is different. And I do think that the defendant should make a clarification for the record if he's requesting an attorney or if he's requesting advisory counsel or to be co-counsel. Those are different.

"THE COURT: We've already gone through all of these. He asked for and was given attorneys twice. He got rid of them.

"MR. MITCHELL: The judge got rid of them.

"THE COURT: After you requested that they do so.

"MR. MITCHELL: Which they don't do unless they see it's valid to do so.

"THE COURT: You asked for them to be released. We're not going over that.

"MR. MITCHELL: Judges don't release because they ask for --

"THE COURT: Excuse me. Excuse me. They released them. You got another one. You could have had another. You could have had a third one, and you decided you wanted to go pro per. And that's where we are today. [¶] Advisory counsel, Judge Clay ruled on that. Co-counsel is not available because you're not a lawyer. And --

"MR. MITCHELL: But I'm performing as a lawyer.

"THE COURT: Exactly. You're going pro per."

Again, on February 25, after opening statements had been made, two witnesses had testified, and a third had begun his testimony, Mitchell again requested counsel. The court denied the request. Additional testimony was taken on February 26 and February 27. On February 28, trial was recessed due to medical issues Mitchell was experiencing. Trial resumed on April 15, when Mitchell was medically cleared following surgery on March 7. During the recess, the court reconsidered its ruling on appointment of counsel, apparently on its own motion, and on March 10 appointed advisory counsel.

2. Analysis

"A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. (*United States v. Wade* (1967) 388 U.S. 218, 223–227; *Gideon v. Wainwright* (1963) 372 U.S. 335, 339–345; *Powell v. Alabama* (1932) 287 U.S. 45, 71.) At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. (*Faretta v. California*, *supra,* 422 U.S. 806, 819 (*Faretta*).)" (*People v. Marshall* (1997) 15 Cal.4th 1, 20, parallel citations omitted.)

There is, however, no constitutionally guaranteed right to the assistance of cocounsel, or of "advisory counsel." (*People v. Blair*, *supra,* 36 Cal.4th at p. 723.) "[A] self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over presentation of the defense case, may do so only with the court's permission and upon a proper showing.' [Citation.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 518, only citation omission added.) A trial court "*may*, in its discretion, appoint counsel to 'render . . . advisory services' to a defendant who wishes to represent himself, in order to promote orderly, prompt and just disposition of the cause." (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430.) "The court also 'has "discretion to deny as well as to grant [a motion for advisory counsel]. . . ." ' [Citations.] '[A]s with other matters requiring the exercise of discretion, "as long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside . . . . [Citations.]" [Citation.]' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 554, only first and last citation omissions added.)

While Mitchell's self-stated "plan" to represent himself with the assistance of advisory counsel may have failed, it does not follow that the court abused its discretion in denying such assistance, and he appears to make no such argument here.

Assuming that Mitchell at some point during the trial unequivocally asked for reappointment of trial counsel, the focus then is whether the trial court abused its discretion in denying that request. Once a defendant has commenced trial representing himself, it is within the sound discretion of the trial court to determine whether he may change his mind and assert the right to appointment of counsel. (*People v. Gallego* (1990) 52 Cal.3d 115, 163–164; *People v. Elliott* (1977) 70 Cal.App.3d 984, 993 (*Elliott*).) In exercising that discretion, the trial court may consider: "(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings,

(4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." (*Elliott, supra,* at pp. 993–994; accord, *People v. Lawrence* (2009) 46 Cal.4th 186, 192 (*Lawrence*).) A court may also consider the defendant's motive in asking to withdraw a *Faretta* waiver. (*People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1126.) However, it is "the totality of the facts and circumstances" which the trial court must consider in determining whether to permit a defendant to again change his mind regarding representation. (*Lawrence, supra,* 46 Cal.4th at pp. 192–193; *People v. Gallego, supra,* 52 Cal.3d at p. 164.)

Mitchell challenges the trial court's response to his February 20, 21, and 25 requests. Mitchell claims on appeal that on each of these days he made "unequivocal requests to withdraw his *Faretta* waiver and reassert his right to counsel in this case." We disagree that Mitchell's colloquies with the court were unequivocal assertions that he wished to withdraw his repeatedly asserted right to self-representation. With respect to his request on February 20, we agree with the People that "[t]he trial court should not be faulted for thinking that [Mitchell] was merely renewing for yet another time his variously phrased requests for advisory counsel," particularly when Mitchell repeatedly advised the court that this had been his "plan" from the outset in requesting self-representation. (See *Lawrence, supra,* 46 Cal.4th at pp. 193–194.) Thus, on February 20, the trial court did not abuse its discretion in proceeding without further comment.

With respect to February 21 and 25, even if we were to assume that Mitchell then unequivocally requested a new trial attorney, we still reject Mitchell's argument that the trial court necessarily abused its discretion by failing to mention all of the above factors on the record each time Mitchell requested reappointment of counsel. Mitchell relies on the *Elliott* court's statement that the trial court "must establish a record based upon the relevant factors involved and then exercise [its] discretion and rule on defendant's request for a change from self-representation to counsel-

representation." (*Elliott, supra,* 70 Cal.App.3d at p. 994.) The Supreme Court has explicitly rejected similar arguments, stating: "[W]e do not agree with the argument's premises that the trial court must review on the record each factor mentioned in *Elliott* or that any one factor is necessarily determinative. The standard is whether the court's decision was an abuse of its discretion *under the totality of the circumstances* (*People v. Gallego, supra*, 52 Cal.3d at p. 164), not whether the court correctly listed factors or whether any one factor should have been weighed more heavily in the balance." (*Lawrence, supra,* 46 Cal.4th at p. 196, italics added.)

That the trial court's response, on February 21 and February 25, was abbreviated does suggest that the trial court's patience with Mitchell was wearing thin. But, the record surrounding Mitchell's prior, repeated requests for advisory counsel is highly relevant to the "totality of the circumstances." In fact, on February 21 and 25, the trial court explicitly referred back to these prior discussions. Accordingly, we view the trial court's response in context. (See *Lawrence, supra,* 46 Cal.4th at p. 196; *U.S. v. Leveto* (3d Cir. 2008) 540 F.3d 200, 208–209.)

Furthermore, the following exchange took place on February 25, albeit after the court had denied Mitchell's motion:

"MR. MITCHELL: How come I have a Penal Code book and it says in the book that the defendant has a right to counsel at all, at every process of trial?

"THE COURT: Unless that person says they want to represent themselves, and that's what you did. And that's where we are. [¶] . . . [¶]

"MR. MITCHELL: How do I countermand that?

"THE COURT: You can't now. It's already been decided. You asked for pro per status. Then you asked for an attorney. You were given an attorney. Two -- or excuse me -- two or three things happened. You were given another attorney. Something else happened. You wanted pro per status again. You were given an investigator. You didn't want that investigator. Something happened with another investigator. You were given another investigator. You've been to court all these

times. You have pro per status. You are not going to be able to have an attorney to represent you on this because you have chosen to represent yourself.

"MR. MITCHELL: And I'm countermanding that choice.

"THE COURT: You cannot come in the middle of the trial, be assigned out to trial, and then all of a sudden say, 'Yeah, but I want an attorney.' That's just playing games and we're not going to allow you to play games with this system."

The above excerpt, along with our review of the entire record, shows that the court explicitly addressed the majority of the *Elliott* factors and the record amply supports the court's implied findings on other factors. The court explicitly discussed the late stage of the long delayed proceedings and Mitchell's history of gamesmanship with respect to representation. The trial court reasonably inferred from the timing of Mitchell's requests an attempt to further delay the trial. The court explicitly noted that any appointment of counsel after Mitchell's lengthy self-representation would certainly have necessitated substantial delay and jeopardized the jury's continued availability. The court had previously said: "[Advisory counsel] cannot jump into a case like this and be prepared to proceed on the 14th." Furthermore, the court reasonably concluded that Mitchell's history of representation suggested gamesmanship, and his own statements to the court about his "plan" indicated manipulation.

Elliott does not compel us to conclude that the trial court abused its discretion. In *Elliott, supra,* the reviewing court concluded that the trial court abused its discretion by refusing to reappoint counsel for a self-represented defendant who made such a request after the jury had been selected, but before opening statements. (*Elliott, supra,* 70 Cal.App.3d at pp. 994, 997–998.) However, in *Elliott*, the public defender, who had been released from representation only when the case had been called for trial, stated that he would be able to commence trial representing the defendant in ten days. (*Id.* at pp. 987–988, 994–995, 998.) The defendant gave a valid reason for requesting termination of his self-representation, the trial was not

lengthy, but the trial judge would only consider granting defendant's request if counsel was prepared to proceed at once. (*Id.* at pp. 995–998.)

Elliott is distinguishable on the facts presented here.[13] Although Mitchell's February 21 request for reappointment of counsel was made at the same stage of proceedings, *Elliott* involved a potential delay of only 10 days because the public defender had been released only on call of the case for trial. (*Elliott, supra,* 70 Cal.App.3d at pp. 991, 998.) Here, on the other hand, Mitchell did not seek reappointment of any of his prior attorneys who might have had some familiarity with the case—and with whom he had asserted conflicts. New counsel would have obviously required a more substantial continuance to be prepared to meaningfully assist Mitchell. Significantly, the court did decide to appoint advisory counsel when the trial was otherwise delayed by Mitchell's medical emergency, providing that attorney with over a month to prepare.

Moreover, Mitchell did not make clear the reasons for his late request to terminate self-representation. Mitchell asserts on appeal that "he was in way over his head," which is consistent with some of his statements to the trial court. It was not the court's obligation, however, to rescue Mitchell from the consequences of what he termed his own "strategic decision." On February 20, Mitchell's request seems to have been motivated by the fact that a potential defense DNA expert, Dr. Blake, declined to work with him as a self-represented defendant. At other times, Mitchell

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[13] Mitchell's reliance on *Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696 is also misplaced. The decisions of the Ninth Circuit are not binding on us. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Furthermore, *Menefield v. Borg* did not involve a midtrial request to terminate self-representation but, instead, a request made in connection with a post-trial proceeding. (*Menefield v. Borg, supra,* 881 F.2d at pp. 697–698, fn. 2.) The Ninth Circuit specifically noted: "There is . . . a substantial practical distinction between delay on the eve of trial and delay at the time of a post-trial hearing. [Citation.] Delay immediately prior to trial engenders a significant potential for disruption of court and witness scheduling. . . . [¶] Conversely, it is unlikely that a continuance *after* the verdict will substantially interfere with the court's or the parties' schedules." (*Id.* at pp. 700–701.)

asserted that his request to terminate self-representation was motivated by the fact that he had been unsuccessful in obtaining advisory counsel. But, he also acknowledged that advisory counsel had never been guaranteed. These ever-shifting justifications, combined with Mitchell's history of *Faretta* and *Marsden* motions, could well have reinforced the trial court's view that Mitchell was simply attempting to manipulate the system. A request to terminate self-representation may properly be denied when the court determines it is merely an attempt to manipulate the court system. (*People v. Trujillo* (1984) 154 Cal.App.3d 1077, 1087.)

Mitchell may certainly have been more effectively represented if counsel had been reappointed. However, "if that fact were determinative, virtually all self-representing defendants would have the right to revoke their counsel waivers at any time during trial. That is not the law. [Citations.]" (*Lawrence, supra,* 46 Cal.4th at p. 196.) Mitchell insisted that he had graduate and undergraduate degrees. The trial court had previously noted: "it sounds like you're a very intelligent person and I don't know any reason why you could not be pro per at this time." Given the totality of the circumstances, we conclude that the trial court did not abuse its discretion in denying Mitchell's requests to terminate his self-representation.

B. Continuance of Trial

Next, Mitchell argues that the trial court abused its discretion, and violated his federal constitutional rights to due process and to counsel, by refusing to continue trial on February 14 and April 15. Specifically, he claims that when "a defendant acts as his own lawyer[,] forcing him to proceed with trial when he is unable not only is an abuse of discretion but is also a violation of his rights to effective assistance of counsel and due process."

1. Background

The record reflects that Mitchell had previously been granted a continuance of trial from October 2007 until January 28. On January 7, Mitchell submitted pretrial motions, again requesting a continuance. At the time the matter was assigned for trial, however, he advised the court that the purpose for the requested continuance

had been to allow him to locate another attorney, and he then asked that the request be stricken.

On February 14, after the trial court indicated its readiness to call for the jury, the record reflects the following colloquy:

"DEFENDANT MITCHELL: Good morning to the court officers. There's been some new developments. I went to the hospital yesterday, as you may or may not be aware, and I don't have the paperwork with me and I can't confirm it, of course, but the diagnosis was that I have a critical heart disease and I may need, I may need an operation.

"THE COURT: Well, I'm sure if that was something that happened yesterday, they would have kept you in there. If you needed it urgently, they would have kept you in the hospital.

"DEFENDANT MITCHELL: Well, the evaluation was made and the examination was made and the information has to be further reviewed by a cardiologist to see how imminent the operation would be.

"THE COURT: All right. Well, you let me know when they say that. [¶] Who is the doctor?

"DEFENDANT MITCHELL: The doctor at the institution?

"THE COURT: Who examined you?

"DEFENDANT MITCHELL: Two technicians that ran this big machine, what do you call it, echocardiogram machine.

"THE COURT: I don't know.

"DEFENDANT MITCHELL: I saw them write the information on the form. They have to send it back to the institution. Then the doctor at the institution, Dr. Orr, has to confer with a cardiologist and I don't know who that will be.

"THE COURT: I can assure you if it was a critical thing with your heart, they would have not let you leave the hospital. They would have done it immediately.

"DEFENDANT MITCHELL: All I'm saying is I saw them write 'critical.'

"THE COURT: Well, they didn't tell us critical. [¶] All right. We will continue."

Mitchell submitted a declaration with his written motion papers, which provided: "Defendant was apprised that he has critical heart disease complications by staff at Highland Hospital. ECG exam and evaluation results will establish how imminent is surgery to correct the problem." The trial court denied the motion for a continuance, stating: "I'm not going to continue a case at this point when we have all of these jurors out here. I am not. Okay? You are not in the hospital. I got a note dated December -- I'm sorry -- February 1, from the staff doctor, Dr. Wilson, and he said you had seen him for a number of complaints and I have a report here that there's nothing urgently wrong with you right now." Mitchell then indicated that he was going to ask his investigator "to go to the hospital and get the documentation [so that he could] submit that as soon as possible." The court indicated: "All right. That's fine. You can do whatever you need to do. . . . [¶] . . . [¶] In the meantime, we're calling for the jury now."

When Mitchell asked for clarification, the court confirmed that Mitchell's motion for a continuance was denied: "I'm not saying you concocted anything. I'm just saying it's been my experience if someone has a serious heart problem and they are in the hospital, they would keep them in the hospital, they won't let you go home and meander around. [¶] Plus a technician is not equipped to say you have a serious heart problem. That's for the heart doctor, who is a thoracic surgeon. . . . [¶] . . . [¶] . . . [I]f I hear from a heart doctor, they are probably telling me that you need to be in the hospital, which I will honor if they tell me you need to be in the hospital. But a technician doesn't know, all they do is run those machines. [¶] Okay. Let's go. Those people are standing outside and we're not going to delay this proceeding any further."

Two weeks later, on February 28, the court stated on the record, outside the presence of the jury: "[W]e received a call this morning from our deputy, who informed us that [Mitchell] had gone in for an Echo exam the other day. And then

they called him and said he had to come back immediately because he had a critical valve, heart valve condition. So he's scheduled for an appointment today, and it's possible that he may have to have surgery. [¶] . . . [¶] So what we want to do is just make a record . . . that we can't proceed today because of Mr. Mitchell's medical condition." On March 3, proceedings were continued to March 10 because Mitchell was scheduled for surgery the next day.

On March 10, the trial was continued to April 16. The trial court stated on the record: "I spoke with the doctor, Dr. Coyness Ennix, who performed the surgery on [Mitchell] last Friday. That would have been March 7th. Dr. Ennix informed me that the defendant is doing very well. He replaced the aortic valve. He said that valve had to be replaced and it's something that needed to be done then. It wasn't anything that could have waited. He was in the down stages so it was a[n] open heart surgery. And he was in intensive care for a few days but now he's . . . on a regular floor. He's sitting up. He should be back to Santa Rita by this Friday. And he said he needed about a month to totally recover. That's why I was looking at the 15th of April."

On April 15, approximately five weeks after his surgery, Mitchell appeared in court and the court noted: "I did speak with Dr. Harold Orr, who is the doctor who is in charge of the medical facility at Santa Rita. Dr. Orr indicated to me that Mr. Mitchell was medically stable and that he was clear for trial.[14] . . . [¶] . . . [B]ased on your medical situation, the Court appointed . . . advisory counsel." Later that day, Mitchell did not explicitly request a continuance, but told the court: "Your Honor, I'm incapable of proceeding with these proceedings because I don't understand what's going on. . . . [¶] . . . [¶] I just said that I am not prepared. I'm not functioning to be able to proceed with these proceedings." Mitchell also complained

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14 The record includes a memorandum from Dr. Orr, dated April 16, which states: "This is to inform you that [Mitchell] is medically cleared to return to court. He can perform all the activities involved in being transported to and from court, including stairs."

that his chest hurt. Mitchell asserted that Dr. Ennix, who performed the heart surgery and had not seen Mitchell since, had recommended Mitchell not proceed with trial until after April 30.[15] Proceedings resumed, over Mitchell's objection.

2. Analysis

"Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) "[T]he decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. [Citations.] The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.] Moreover, the denial of a continuance may be so arbitrary as to deny due process. [Citation.] However, not every denial of a request for more time can be said to violate due process, even if the party seeking the continuance thereby fails to offer evidence. [Citation.] Although 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.' [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920–921, only citation and paragraph formatting omissions added; accord, *Ungar v. Sarafite* (1964) 376 U.S. 575, 589.)

The trial court did not abuse its discretion in denying Mitchell's February 14 continuance motion. There was simply no evidence at that time substantiating the

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[15] Dr. Ennix's letter actually states: "[Mitchell] was transferred to Alta Bates Summit Medical Center, in Oakland, on March 4, 2008 with the diagnosis of aortic valve stenosis and insufficiency. He underwent open heart surgery for replacement of his aortic valve on March 7th. The patient was discharged from the hospital, on March 19th. The patient will recover for six weeks following discharge, and is *expected* to be fit for a trial date of April 30, 2008, or thereafter." (Italics added.)

need for a continuance. (§ 1050, subds. (b) [continuances in criminal proceedings require filing written notice with affidavits or declarations detailing specific facts demonstrating necessity], (i) [continuances granted only for period of time evidence shows is necessary]; Cal. Rules of Court, rule 4.113 [criminal trial continuances disfavored; moving party must present "affirmative proof in open court that the ends of justice require a continuance"].) Mitchell was present in court and not in the hospital. He presented no evidence from a medical doctor showing he was unable to proceed. Mitchell had obtained an order for a medical evaluation of his heart condition two years earlier, on March 22, 2006, and the court could reasonably have expected that medical evidence would have been submitted had it supported Mitchell's request. Mitchell said he would submit such evidence, but then failed to do so. Further, Mitchell himself conceded that it was unknown when surgery might occur. Mitchell's declaration did not indicate that he was in any physical pain or suffering any impairment. That Mitchell was eventually hospitalized and underwent surgery, does not mean that the trial court abused its discretion when it denied Mitchell's February 14 motion on the basis of the evidence then before it.

Nor did the trial court abuse its discretion by resuming proceedings on April 15, rather than on April 30. The trial court *did* continue the trial so that Mitchell could recover from surgery. Even assuming that Mitchell properly raised the issue of a further continuance, the trial court was not required by anything contained in Dr. Ennix's letter to continue trial until April 30. (*People v. Medina* (1995) 11 Cal.4th 694, 739 [trial court had no sua sponte obligation to continue trial absent request]; *People v. Mazoros* (1977) 76 Cal.App.3d 32, 41 [medical reports are not determinative but only a factor considered by the court].) The trial court reasonably relied on Dr. Orr's opinion because Dr. Orr had more recent contact with Mitchell. Furthermore, the trial court indicated its understanding that Dr. Ennix's letter was "based upon the general ways things generally go," that it did not indicate any unusual situation, and that Dr. Ennix "had not seen [Mitchell] since the surgery." The record does not contain any evidence, beyond Mitchell's vague complaints, that

specifically supports his current assertion that he "was required to proceed to trial with an attorney who was ill and did not possess the cognitive abilities necessary to adequately defend [himself]." The trial court in fact observed otherwise.[16] We cannot say that the trial court abused its discretion. Having found no abuse of discretion, we also reject Mitchell's constitutional claims.

C. Role of Advisory Counsel

Notwithstanding his repeated requests for advisory counsel, and his insistence here that he unequivocally sought to terminate his pro per status, Mitchell complains that the advisory counsel who was ultimately appointed interfered with his *Faretta* right to present his own defense.

1. Background

After advisory counsel's appointment, Mitchell asked for counsel to play a greater role, stating: "I'm not going to do anything . . . . I'm going to let him handle the case." The trial court explained: "He's only going to be assisting you." Later, Mitchell asked that the trial court allow advisory counsel to cross-examine witnesses. The court denied these requests, explaining: "That's not allowed. . . . [¶] . . . [¶] [H]e's not here to ask questions. He's just here to advise you. [¶] . . . [¶] That's not the role of advisory counsel, no. He's not co-counsel. He's not counsel. He's only here in a limited capacity to advise . . . you on certain legal issues." The trial court allowed advisory counsel to suggest questions for Mitchell's cross-examination.

Mitchell's complaint here relates to advisory counsel's involvement with Dr. Ford, a DNA expert engaged for the defense. On the day Dr. Ford was expected

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[16] Although Mitchell now claims that he suffered cognitive difficulties because of a new medication, our review of the trial record does not indicate any attempt to bring this issue to the trial court's attention before Mitchell moved for a new trial. Thus, to the extent Mitchell relies on his purported medication to argue that proceedings should not have resumed on April 15, the claim is unsupported by the record. Furthermore, Mitchell has not challenged the finding that he was competent to stand trial. Accordingly, any "long standing mental health issues" that Mitchell claims to have suffered since 1985, are irrelevant.

to testify, the record reflects the following discussion outside the presence of the jury:

"THE COURT: All right. The next thing that I wanted to say is that we had allocated $2,000 for a DNA expert. And [advisory counsel] has just presented me with a bill that came to $3,344, and that was from DNA expert Simon Ford, Ph.D., who is writing a report and has his record of the work that he did in this case. [¶] And [advisory counsel], did you have a chance to speak with Dr. Ford about testifying in court?

"[ADVISORY COUNSEL]: Yes. He is still involved in the San Mateo thing. He is on standby. He has to be there. If he's not there today, he's supposed to be there tomorrow. And --

"THE COURT: He couldn't come in here today for a little while?

"[ADVISORY COUNSEL]: He's on standby. He has to be within an hour away. He has to be there within an hour from the phone call.

"THE COURT: So he would not come in today and testify if we asked him to?

"[ADVISORY COUNSEL]: No. The reason is that he's, you know, if they called him, he's got to go.

"THE COURT: All right. And did you have a chance to talk to him about what he would say if he were to testify?

"MR. MITCHELL: Your Honor, that's hearsay.

"THE COURT: We're not in front of the jury. This is for my records.

"[ADVISORY COUNSEL]: Yes, Your Honor. I believe earlier I had indicated to the Court what he would say if he were called to testify. The biggest thing he would say is that he -- and I'm not sure if I should do this in front of the prosecutor or not. If the Court wants me to I will.

"THE COURT: Yeah, I do want you to.

"[ADVISORY COUNSEL]: The biggest thing is he would disagree with the statistics for two reasons. The first reason being since it's from a database, he thinks

the statistics should be adjusted in the defendant's favor, No. 1. [¶] No. 2, he classifies the male profile that was obtained from the sperm fraction as being a mixture as opposed to a single source. And because of that, he would again adjust the statistics in favor of the defendant. His adjustment out of 18 zeros, if you get rid of three, four, five zeroes, you still have a big number. And it would not be very --

"THE COURT: He would get rid of three to five zeroes, and instead of it being one in one quadrillion, it would be one in --

"[ADVISORY COUNSEL]: A couple hundred million or something like that.

"[THE PROSECUTOR]: There's 18 zeroes. If you get only rid of three of them, you've still got 15 zeroes.

"[ADVISORY COUNSEL]: Maybe you get it down to 12 zeroes.

"THE COURT: If you're down to 12 zeroes, what is that? A billion?

"[ADVISORY COUNSEL]: No, it's more than a billion.

"THE COURT: A trillion. So a one followed by 12 zeroes as opposed to a one followed by 18 zeroes?

"[ADVISORY COUNSEL]: 18.

"THE COURT: So in your opinion as an attorney, would you call such a witness?

"[ADVISORY COUNSEL]: No.

"THE COURT: Why not?

"[ADVISORY COUNSEL]: He can't help me. We sought through cross-examination to bring out, flush out those points, and what you would have is ultimately Mr. Ford would not be disagreeing. He would just be making adjustments.

"THE COURT: Okay. And he is not available until when?

"[ADVISORY COUNSEL]: Next week. Next Monday. He's still involved in a murder case in San Mateo County.

"THE COURT: Now, if this were some testimony that would be beneficial to Mr. Mitchell, we would consider waiting. But in this situation where it's not going to benefit him in any way to have this witness testify --

"MR. MITCHELL: Your Honor, you don't know that.

"THE COURT: -- then the Court is not willing to continue this matter until next Monday. Therefore, we're going to proceed. [¶] And do you have any further witnesses that you wish to call?

"MR. MITCHELL: (Shaking head from side to side.)

"THE COURT: Are you going to testify on your own behalf?

"MR. MITCHELL: My testimony is contingent upon examining the witness, the witness that [advisory counsel] --

"THE COURT: How could that be? There's a lot of stuff other than the DNA stuff. There's a lot of things that if you wanted to testify, you have the opportunity now."

A few pages later in the record, Mitchell asked "[h]ow in the hell am I acting like an attorney when he's doing every fucking thing[?]" The record then reflects the following discussion:

"THE COURT: All right. I'm not going to have this conversation with you. Are you going to testify?

"MR. MITCHELL: I want to testify after this witness, after this witness.

"THE COURT: You are not going to have this witness. We do not have another $2,000 for this witness, No. 1. [¶] No. 2, the witness cannot help you in any way.

"MR. MITCHELL: You don't know that.

"THE COURT: I've just talked to [advisory counsel].

"MR. MITCHELL: He's not the attorney.

"THE COURT: He has talked to that man.

"MR. MITCHELL: What man?

"THE COURT: Dr. Simon Ford.

"MR. MITCHELL: That's hearsay."

Later that same day, Mitchell stated: "I want my DNA witness here. [¶] . . . [¶] Why can't he be here if the Court paid the bill?" The court responded: "Because he was not available."

2. Analysis

Mitchell asserts that the trial court violated his right to self-representation by allowing advisory counsel to assume too great a role, including engaging a DNA expert and then "determin[ing] that the expert would not be needed for testimony." Accordingly, he argues that advisory counsel usurped Mitchell's exclusive right, as counsel, to make tactical decisions. The record fails to support Mitchell's position.

Where advisory counsel is appointed, the "court retains authority to exercise its judgment regarding the extent to which such counsel may participate" in trial proceedings. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368; accord, *McKaskle v. Wiggins* (1984) 465 U.S. 168, 174, 177–179, 183 (*McKaskle*).) In *McKaskle*, the United States Supreme Court addressed whether a defendant's right to self-representation had been violated by the participation of standby counsel, who were present at trial over the defendant's objection. The defendant in that case, at times, requested that counsel not be allowed to interfere with his presentations in court. Nonetheless, outside the presence of the jury, standby counsel explained their views, including disagreement with the defendant, to the trial court, made motions, proposed strategies on the record, and suggested questions for the defendant to ask. When the defendant complained on appeal that standby counsel's participation had impaired his right to represent himself, the reviewing court concluded: "[N]o absolute bar on standby counsel's unsolicited participation is appropriate or was intended. The right to appear [*pro per*] exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel." (*McKaskle*, *supra*, 465 U.S. at pp. 170, 172–173, 176–177, 180.)

The court imposed limits, however: "First, the [*pro per*] defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded. [¶] Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." (*McKaskle, supra,* 465 U.S. at p. 178.) The court further stated: "*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the [*pro per*] defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the [*pro per*] defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." (*Id.* at p. 179, fn. omitted.) The Supreme Court concluded that standby counsel's participation outside the presence of the jury did not violate these limits because the defendant was given ample opportunity to present his own views and all conflicts were resolved in his favor. (*Id.* at p. 181.)

Here, Mitchell complains of advisory counsel's participation in matters occurring outside the presence of the jury. First, we reject any argument that it was improper for advisory counsel to engage a DNA expert, Dr. Simon Ford, whose original purpose was to advise counsel regarding DNA issues so that he could in turn properly advise Mitchell. Mitchell never identified any other DNA expert willing to accept assignment of his case, but only challenged counsel's authority to act, and stated his preference that advisory counsel work with Dr. Blake—an expert who had already declined to work with Mitchell as a self-represented party. Ultimately, however, Mitchell expressed his desire to call Dr. Ford to testify on his behalf, despite advisory counsel's professional opinion that the witness would not be helpful to the defense. Thus, Mitchell cannot now complain of advisory counsel's involvement. "Even when he insists that he is not waiving his *Faretta* rights, a [*pro*

per] defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably." (*McKaskle, supra,* 465 U.S. at p. 182.)

In any event, contrary to Mitchell's contention here, advisory counsel did not make a tactical decision, over Mitchell's objection, as to whether Dr. Ford would testify. Nor did the trial court resolve "disagreements" between Mitchell and advisory counsel. The record instead shows that advisory counsel only informed the court of Dr. Ford's unavailability, and made an offer of proof at the court's request as to his anticipated testimony, so that the court could determine if a continuance was appropriate.[17] Advisory counsel did not decide whether Dr. Ford would be called to testify. "Participation by [advisory] counsel to steer a defendant through the basic procedures of trial is permissible . . . ." (*McKaskle, supra,* 465 U.S. at p. 184.)

We also need not address the merits of Mitchell's argument that advisory counsel divulged attorney-client privileged information when he informed the court and prosecutor of the general substance of the anticipated testimony to be given by Dr. Ford, and another witness that Mitchell had attempted to subpoena, Bernard Fosten (sometimes referred to by title and last name of "Dean Fosten"). Mitchell did not raise a privilege objection of any kind before the trial court. In fact, he did not object to the information being disclosed at all, other than to claim at one point that advisory counsel's recitation was "hearsay." Accordingly, he failed to preserve the argument.[18] (Evid. Code, § 912; *People v. Combs* (2004) 34 Cal.4th 821, 862; *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, 187.) Mitchell cannot claim

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[17] Mitchell does not contend that the trial court abused its discretion by failing to continue proceedings to allow Dr. Ford to testify.

[18] Mitchell does not claim on appeal that advisory counsel's disclosures violated the privilege against self-incrimination. Mitchell only raises the work product privilege in passing and includes no citation to supporting authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [a court may treat a point made without legal argument and citation to authority as waived, "and pass it without consideration"].) In any event, any such claims would likewise appear to have been forfeited by Mitchell's failure to object.

ineffective assistance of counsel from his own shortcomings. (*Faretta, supra,* 422 U.S. at pp. 834–835, fn. 46; but see Evid. Code, § 955 ["lawyer who received or made a communication subject to the privilege . . . shall claim the privilege whenever he is present when the communication is sought to be disclosed"].)

Even if the issue had been preserved, we would not reach a different result. First, neither witness testified. Thus, even if privileged information was disclosed to the prosecution, we fail to see how the disclosures could have impacted the verdict. (See *People v. Blair, supra,* 36 Cal.4th at pp. 726–728 ["even had the prosecutor never learned of [defense expert's] opinion . . . and never called him to testify, it is not reasonably probable that the outcome of the guilt phase would have been different"].) Second, had the witnesses testified, the purportedly privileged information would have inevitably been disclosed in course of their testimony. Further, had the witnesses testified as Mitchell wished, it appears that the testimony would have been either unhelpful, or far more damaging to the defense than helpful. Dr. Ford would have confirmed the evidentiary match with Mitchell's DNA profile, disputing only the statistical significance by reducing the frequency of occurrence to perhaps 1 in 1 trillion ("[m]aybe you get it down to 12 zeroes"). Bernard Fosten, who was subpoenaed by the defense, allegedly to testify as to the length of Mitchell's hair in 1997, called the court directly to state that he had not seen Mitchell in twenty years, and had no information to offer on the pending case. Bernard Fosten appeared out of the presence of the jury and spoke with Mitchell, and had "no recollection" of anything to which Mitchell wished him to testify. Mitchell cannot establish prejudice, and makes no attempt to do so.[19]

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[19] Mitchell's reliance on *Barber v. Municipal Court* (1979) 24 Cal.3d 742 is misplaced. In *Barber v. Municipal Court*, the defendants' right to communicate privately with counsel was violated by an undercover police officer's attendance at numerous confidential attorney-client meetings over the course of a two-month period. (*Id.* at pp. 745, 747–749, 756.) The Supreme Court held that dismissal was the only adequate remedy because the prejudice suffered by the defendants from the extensive invasion could not be calculated. (*Id.* at pp. 756–760.) No similar intrusion occurred in this case.

D. Physical Restraints and Removal from the Courtroom

Mitchell contends the trial court violated his federal constitutional rights by restraining him before the jury and by removing him from the courtroom. Mitchell also argues that the trial court erred by failing to instruct the jury sua sponte that the use of restraints should not be considered in determining his guilt.

1. Background

Contrary to Mitchell's assertion, the record does *not* suggest that Mitchell was restrained before the jury during the entire trial. The record reflects that Mitchell was restrained during transport to and from the courtroom,[20] but that he was not ordered restrained in the courtroom and before the jury until April 28.[21] On April 28, after discussion of Dr. Ford's unavailability and whether Mitchell would testify, the record reflects the following exchange outside of the presence of the jury:

"THE COURT: The record should reflect that there was an outburst, another outburst by Mr. Mitchell wherein he picked up all of his files and threw them toward the Court.

"THE BAILIFF: Do you want him in the courtroom or out?

"THE COURT: I want him shackled. Sit down and be shackled. That's it. We're not having this.

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[20] It has been held that "where one or more jurors or veniremen merely witnessed defendant being transported to or from the courtroom in visible restraints the trial court has no duty, sua sponte, to instruct the jury that the physical restraints on defendant have no bearing on the determination of guilt." (*People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1141.) Because Mitchell did not request it, the trial court properly refrained from giving such an instruction. (*Id.* at pp. 1141–1142.)

[21] The minute order from April 28, on which Mitchell relies, does not state that he was restrained prior to that date. It provides: "The Court places on the record that the defendant threw a plastic bag full of paper at the Court and he has been and will be restrained for the duration of the trial." A fair reading of this statement is that Mitchell "has been" restrained in response to his disruptive conduct on April 28, not that he "has been" restrained throughout the trial. The transcript reflects that after Mitchell's outburst on April 28, the trial court stated: "I want him shackled." The trial court's statement indicates that Mitchell had not previously been restrained.

"MR. MITCHELL: You want to continue?

"THE COURT: Yes. That's what happens when you start throwing stuff in the courtroom. [¶] All right. We need some other deputies in here.

"MR. MITCHELL: Amazing grace, how sweet the sound, that saved a poor wretch like me. I once was lost --

"THE COURT: Do you want to be gagged, too?

"MR. MITCHELL: -- but now, I'm found.

"THE COURT: Do you know how they gag you?

"MR. MITCHELL: Was blind but now I see. Through dangers, toils and snares, I have already come. Was faith --

"THE COURT: Let me, just for the record --

"MR. MITCHELL: -- and faith will lead me on.

"THE COURT: We will use the --

"MR. MITCHELL: Amazing grace --

"THE COURT: -- burglary clause, sex offense burglary clause, special jury instruction that was prepared by the D.A. That will be acceptable. And that will be over your objection, Mr. Mitchell.

"MR. MITCHELL: -- was blind but now I see.

"THE COURT: And use the sex offense tying and binding clause.

"MR. MITCHELL: Respect is a two-way street. Amazing grace --

"(The defendant continuously sings during the proceedings . . .)"

The jury was brought into the courtroom and the following discussion ensued:

"THE COURT: Good morning, ladies and gentlemen. The record should reflect that all parties are present. And we are in a situation here where, Mr. Mitchell, do you have any witnesses, any further witnesses to call?

"MR. MITCHELL: Yes, I do, Your Honor.

"THE COURT: At this time?

"MR. MITCHELL: I have a witness. I want the DNA witness, my DNA witness to appear. And the judge refuses to let the DNA witness appear.

"THE COURT: All right. Then that witness is not going to appear. Do you have another witness besides the DNA witness?

"MR. MITCHELL: I have myself that I want to testify but I don't want to testify until after the DNA witness testifies.

"THE COURT: You have now to testify. Do you want to testify? You can sit there and testify or you can be sworn in and you can testify.

"MR. MITCHELL: I can't testify until after the DNA witness testifies.

"THE COURT: Then I take it that you're not going to testify?

"MR. MITCHELL: I am not going to testify until the --

"THE COURT: You are not going to have the DNA witness; therefore you may testify now. [¶] . . . [¶] Do you want to testify now?

"MR. MITCHELL: I told you that.

"THE COURT: You're either going to testify now or we're going to proceed with closing arguments.

"MR. MITCHELL: I'm not in a position to testify now.

"THE COURT: Ladies and gentlemen, then I take it then the defense is resting?

"MR. MITCHELL: No, the defense isn't resting.

"THE COURT: The defense is finished.

"MR. MITCHELL: No, the defense isn't finished.

"THE COURT: The defense is finished because they don't have any witnesses to call.

"MR. MITCHELL: Amazing grace -- This is justice, jury. This is justice. This is justice."

The prosecution commenced its closing argument while Mitchell continued to sing. Later, Mitchell further interrupted:

"MR. MITCHELL: The jury has not been told why I was not able to have a --

"[THE PROSECUTOR]: The evidence shows --

"THE COURT: Hold on a second. Mr. Mitchell. Mr. Mitchell.

"MR. MITCHELL: I don't appreciate not being able to address the jury --

"THE COURT: You want to sit him in the room there?

"MR. MITCHELL: -- and tell the jury why I was not able to have a defender. The jury was not informed correctly about why I was not able to have a lawyer, and the judge refused to let me explain.

"THE COURT: You're going to go inside that room unless you shut up.

"MR. MITCHELL: And --

"THE COURT: All right. In there. We can't hear.

"MR. MITCHELL: I have a --

"THE COURT: [Advisory counsel], if you can take notes and let him know what's going on."

After the prosecution's argument was concluded and the jury removed from the courtroom, the trial court stated: "[T]he Court had to remove Mr. Mitchell from the courtroom. I was trying to keep him in the courtroom during the closing argument but he became louder. And then when he started instead of singing Amazing Grace, he was adding his own words that had to do with freedom and carrying on that was quite disruptive so the Court removed him right into the stairwell so he could, if he would listen, he could hear because we could still hear him carrying on. [¶] Now, for this afternoon, I will give Mr. Mitchell an opportunity to do a closing. If he chooses to do one, he'll do it. . . . [¶] . . . [¶] [Advisory counsel], I would like for you to be here just for the record to make sure his -- I mean, I've been trying to protect his rights as best we can. It would not be fair for you to argue this case for him because you're not in that type of a position. So maybe you can confer with him and tell him it might be -- just confer with him and tell him what was kind of brought out in the D.A.'s closing argument so he'll know what to argue if he chooses to do so." Advisory counsel agreed.

Mitchell was then returned to the courtroom. When the trial court repeatedly asked Mitchell if he was going to make a closing argument, Mitchell responded: "I'm not capable of making a closing argument." Mitchell was again removed from

the courtroom, at his own request, during the reading of jury instructions. The trial court noted: "The record should reflect that the defendant is in the room where you should hear over the top, you can hear the rest of the jury instructions, but he started to sing[] again."

Later, outside the presence of the jury, the statement was made (attributed to advisory counsel) that: "And I didn't mention at the time when I think I made a note earlier this morning, when the defendant made a, tried to disrupt the courtroom, not only did he throw his packet of papers toward the Court and it landed at the clerk's, at the clerk's chair and it was all over the floor there, but he also in that same time tried to tip over the table, counsel table there, was able to tip it." The prosecutor added: "There were a few of the signs that are on the table that fell on to the ground."

2. Use of Physical Restraints

In *Deck v. Missouri* (2005) 544 U.S. 622, a majority of the United States Supreme Court held that "the [federal] Constitution forbids the use of visible shackles during [trial], *unless* that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial. [Citations.]" (*Id.* at p. 624.) In *People v. Duran* (1976) 16 Cal.3d 282 (*Duran*), the California Supreme Court reaffirmed the rule that "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. [Citation.]" (*Id.* at pp. 290–291, fn. omitted.) "Manifest need" arises on a showing of unruliness, an announced intent to escape, or when there is "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . ." (*Id.* at pp. 292–293, fn. 11.)

In *Duran*, the Supreme Court went on to specify how manifest need should be determined. "In the interest of minimizing the likelihood of courtroom violence or other disruption the trial court is vested, upon a proper showing, with discretion to order the physical restraint most suitable for a particular defendant in view of the

attendant circumstances. The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Duran, supra,* 16 Cal.3d at p. 291.) A trial court's determination of the necessity of restraint, when made in accordance with the principles laid down in *Duran*, "cannot be successfully challenged on review except on a showing of a manifest abuse of discretion." (*Id.* at p. 293, fn. 12.)

We conclude the trial court did not abuse its discretion by ordering Mitchell physically restrained. First, Mitchell did not object to the use of restraints below. " 'It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and make a record below waives the claim [on appeal]. [Citations.]' [Citation.]" (*People v. Majors* (1998) 18 Cal.4th 385, 406, first citation omission in original.) Even if Mitchell's present claim was not forfeited, a clear record was made of Mitchell's violent and disruptive conduct inside the courtroom on April 28. Nor was this the first incident. The record reflects that Mitchell had been warned after prior outbursts. On this record, the trial court did not abuse its discretion in concluding that Mitchell posed a continued threat of violence and disruption in the courtroom if not restrained.

3. Failure to Instruct Sua Sponte that Restraints Should Have No Bearing on Defendant's Guilt

Mitchell also complains, in reliance on *Duran, supra,* 16 Cal.3d 282, of the trial court's failure to instruct the jury sua sponte that the restraints should have no bearing on the determination of his guilt.[22] *Duran* only requires such an instruction

[22] CALJIC No. 1.04 (Fall 2009 ed.) states: "The fact that physical restraints have been placed on defendant [] must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] [she] is

in cases in which the restraints were visible to the jury. (*Id*. at pp. 291–292.) "However, when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided." (*Id*. at p. 292, fn. omitted.)

Nothing in the record affirmatively indicates that Mitchell's restraints were visible to the jury. Mitchell was ordered restrained outside the jury's presence. Mitchell did not testify.[23] Mitchell asks us to infer that the restraints were visible to the jury when he was removed from the courtroom, without a recess, during closing argument. Because the People concede that Mitchell's restraints became visible to the jury and that the court was required to give the instruction, we will assume as much.

In any event, the error was not prejudicial. "The harmless error standard applicable to shackling cases is unsettled. In *Duran* the court applied the [*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)] standard, stating '[w]e express no opinion whether any one or more of the errors herein resulted in deprivation of any federal constitutional right of sufficient stature to require reversal based upon the rule of *Chapman v. California* (1967) 386 U.S. 18, 24 [(*Chapman*)].' (*Duran, supra,* 16 Cal.3d at p. 296, fn. 15.) In *People v. Jacla* (1978) 77 Cal.App.3d 878, 891, the court applied the *Chapman* standard." (*People v. Givan* (1992) 4 Cal.App.4th 1107, 1118, parallel citations omitted, first & last instances of bracketed material added; see also *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1829–1830; *People v. Jacobs, supra,* 210 Cal.App.3d 1135, 1142 [suggesting failure to instruct should be tested by the *Watson* standard].) We need not resolve the conflict, because the instructional error was harmless under either standard.

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more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issues in this case, disregard this matter entirely."

[23] Mitchell does not claim on appeal that the restraints influenced his decision not to testify. Furthermore, the trial court told Mitchell he could testify from his seat.

The restraints, if seen at all, were visible only briefly. The evidence of Mitchell's guilt was overwhelming. Thus, the trial court's failure to instruct the jury to ignore Mitchell's restraints was harmless beyond a reasonable doubt. (See *People v. Medina* (1990) 51 Cal.3d 870, 898 [failure to instruct harmless where defendant did not testify and no other substantial errors].)

4. Mitchell's Removal from Courtroom

Mitchell argues that "[his] removal . . . from the courtroom, and the accompanying forfeiture of his right to counsel, to present a defense, to testify in his own defense, and to argue the case to the jury violated these fundamental rights and caused the proceedings to devolve into a farce."

The accused has both a constitutional and a statutory right to be present during all critical stages of his or her trial. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; §§ 977, 1043.) This right is not absolute, however, and can be surrendered "after [the defendant] has been warned by the judge that he will be removed if he continues his disruptive behavior, [and] he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois v. Allen* (1970) 397 U.S. 337, 342–343, fn. omitted; accord, § 1043, subd. (b)(1).) We "must give considerable deference to the trial court's judgment as to when disruption has occurred or may reasonably be anticipated. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 773.)

Giving the required deference to the trial court's judgment, we find no error in the trial court's conclusion that Mitchell's behavior, despite repeated warnings that continued disruptions would lead to his removal, justified restriction of his right to be present.

When a defendant is self-represented, an order excluding him or her from the courtroom also implicates the right to counsel. (See *People v. Carroll* (1983) 140 Cal.App.3d 135, 141–143 (*Carroll*).) Although Mitchell's argument on this point is not altogether clear, he appears to argue that reversal is required because he

was unrepresented by counsel during the prosecutor's closing argument, which deprived him of an opportunity to make his own closing argument.[24]

The cases of *Carroll, supra,* 140 Cal.App.3d 135 and *People v. El* (2002) 102 Cal.App.4th 1047 (*El*) are instructive on this issue. In *Carroll,* the defendant waived his right to counsel and elected to represent himself. The day before trial, however, the trial court denied his request for the appointment of counsel. Carroll repeatedly stated, before the jury, that he was incompetent to stand trial and asked for counsel to be appointed, which led to his removal from the courtroom. Meanwhile, the testimony of several key witnesses continued without Carroll, or any counsel representing him. These witnesses were not cross-examined. Eventually, Carroll returned to the courtroom and examined other witnesses. Carroll was convicted. (*Carroll, supra,* 140 Cal.App.3d at pp. 137–141.)

On appeal, the Second District Court of Appeal held: "[U]nder the circumstances of our case, the involuntary exclusion from the courtroom of a defendant who was representing himself, without other defense counsel present, was fundamental error requiring reversal without regard to prejudice." (*Carroll, supra,* 140 Cal.App.3d at p. 142.) In so ruling, the court explained: "[t]he right to counsel at trial is such that its absolute denial cannot be deemed harmless error." (*Id.* at p. 141.) The *Carroll* court noted three possible alternatives that had not been attempted before removal: (1) the appointment of counsel, (2) a contempt

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[24] At oral argument, Mitchell belatedly challenged his removal during the trial court's instructing of the jury. We need not consider arguments that are not raised until oral argument. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 232, fn. 6; *People v. Modina* (1905) 146 Cal. 142, 144.) Even if the issue had been properly raised, we would find no error in Mitchell's voluntary absence. (*People v. Parento* (1991) 235 Cal.App.3d 1378, 1380–1382 [defendant who initially elected to defend himself, then unsuccessfully moved for appointment of counsel on day of trial, and thereafter voluntarily absented himself from the proceedings could not claim error from his absence or lack of counsel].)

proceeding against the defendant, and (3) allowing the defendant to remain in the courtroom under restraints. (*Id.* at p. 142.)

The facts of this case, however, are closer to those found in *El, supra,* 102 Cal.App.4th 1047. El represented himself at trial, but standby counsel was also present. During the prosecution's opening statement, El repeatedly interrupted with spurious objections. After a warning outside the jury's presence, El continued his objections and was eventually removed from the courtroom for the remainder of the prosecutor's statement. Despite standby counsel's presence, the trial court did not appoint counsel after El's removal. El was allowed to return to the courtroom after the prosecution's statement was concluded, at which time he made his own opening statement. (*Id.* at p. 1049.)

On appeal, El conceded he improperly disrupted the People's opening statement. (*El, supra,* 102 Cal.App.4th at pp. 1049–1050.) Nevertheless, El argued, in reliance on *Carroll*, that denial of his right to counsel required automatic reversal without the necessity of showing prejudice. The Second District Court of Appeal agreed with El that the court erred by proceeding in his absence when standby counsel was available to defend him; however, "because the court's error left appellant unrepresented for only a brief time, reversal is not automatic. On the contrary, it is well established that anything less than the complete denial of the right to counsel is subject to harmless error analysis. . . . Under such an analysis, we must affirm the judgment if we are convinced beyond a reasonable doubt that the court's error in permitting the prosecutor to finish her opening argument in the absence of defense counsel did not affect the trial's outcome. [Citations.]" (*Id.* at p. 1050.)

The *El* court distinguished *Carroll*, noting: "*Carroll*'s egregious facts are not present here . . . . In contrast to *Carroll,* appellant was involved in jury selection, permitted an opening statement and closing argument, did not miss any testimony, and was allowed to cross-examine witnesses. His absence from the courtroom amounted to only five pages' worth of the prosecutor's opening argument. As the denial of his right to counsel was less than total, harmless error analysis applies."

(*El, supra,* 102 Cal.App.4th at p. 1051.) Applying the harmless analysis test, the court determined that reversal was not required because "[n]othing in the prosecutor's assertions [made during El's absence] was objectionable and her workmanlike argument scored against [El] no more damage than that already inflicted by the state of the evidence." (*Ibid.*)

We observe that Mitchell's conduct at the time of his removal was far more disruptive than in *El*, and clearly calculated to make it impossible for orderly proceedings to continue. This left the trial judge, whose patience was obviously already sorely tried by Mitchell's persistent contumacious behavior, no practical alternative but to remove him.

Assuming that it was error to remove Mitchell from the courtroom without appointing counsel, we conclude that any error was harmless because the denial of Mitchell's right to counsel was less than total. (*El, supra,* 102 Cal.App.4th at p. 1051.) Here, similar to the defendant in *El*, Mitchell was involuntarily removed from the courtroom only for a portion of the prosecution's closing argument. Advisory counsel was present, and the trial judge noted that Mitchell would have been able to hear the proceedings in the stairwell to where he had been removed, had he not been loudly singing. Similar to the defendant in *El*, Mitchell was not absent for any witness testimony, had a full opportunity to cross-examine witnesses, and had the opportunity to argue to the jury.

Mitchell claims, however, that his absence foreclosed him from presenting closing argument.[25] Mitchell did not indicate at trial that he felt incapable of making a closing argument because he had not been able to hear the prosecution's entire closing argument. In fact, even before his removal from the courtroom, Mitchell stated: "I'm unprepared to do the closing argument. I'm not mentally alert, failing strength, physiological and mental exhaustion." The record suggests that the trial

[25] We reject Mitchell's contention that his removal from the courtroom somehow deprived him of his right to testify in his own defense. Mitchell declined to testify *before* he was removed from the courtroom.

court made efforts to ensure that Mitchell was aware of the substance of the prosecution's argument. The trial court asked Mitchell's advisory counsel to take notes on the substance of the argument and share those notes with Mitchell after his return to the courtroom. The court also placed Mitchell in the stairwell where he could hear the argument, had he chosen to listen.

We decline to distinguish *El* merely because Mitchell claimed he was "incapable" of making a closing argument. Mitchell is correct that "it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge." (*Herring v. New York* (1975) 422 U.S. 853, 858, fn. omitted.) However, the "alleged denial of the right to present argument cannot be raised for the first time on appeal and . . . the burden is on defendant to make his desire to present argument known to the trial court. [Citations.]" (*People v. Manning* (1981) 120 Cal.App.3d 421, 427 [bench trial]; see also § 1093, subd. (e) ["the district attorney . . . and counsel for the defendant, *may* argue the case to the court and jury" (italics added)].) Here, the trial court gave Mitchell the opportunity to make a closing argument, which he refused.

Mitchell does not argue in his appellate briefs that he would have objected to any portion of the prosecutor's argument, had he been present in the courtroom. Nor, after our own review of the record, do we find anything objectionable in the relevant part of the prosecutor's closing argument. As our summary of the evidence presented at trial reveals, the evidence of Mitchell's guilt was overwhelming. In these circumstances, any error was harmless beyond a reasonable doubt. (See *El*, *supra*, 102 Cal.App.4th at p. 1051.)

E. Cumulative Error

Finally, Mitchell argues that the cumulative effect of the trial court's errors requires reversal of the judgment. We have rejected the majority of Mitchell's arguments on the merits. We identify only two errors, both of which we consider harmless when considered either individually or cumulatively. Mitchell was entitled

to a trial "in which his guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) He received such a trial.

III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

_____
Simons, J.